Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
FCC Seeks Comment on Adopting Egregious Cases Policy	)	GN Docket No. 13-86
	)	

To: The Commission

JOINT COMMENTS

Americom, L.P.; Americom Las Vegas Limited Partnership; Beasley Broadcast Group, Inc.; Broadcasting Licenses, L.P.; Calkins Media Incorporated; Eagle Creek Broadcasting of Laredo, LLC; Entercom Communications Corp.; Galaxy Communications, L.P.; Greater Media, Inc.; Journal Broadcast Corporation; Lincoln Financial Media Company; Mountain Licenses, L.P.; Ramar Communications, Inc.; and Stainless Broadcasting, L.P. (collectively, "Joint Commenters"), by their attorneys, hereby submit the following comments in response to the Federal Communication Commission's ("FCC" or "Commission") Public Notice, DA 13-581, released April 1, 2013 (the "Notice") in the above-captioned proceeding.[1] The Notice seeks comment on whether the Commission should make changes to its current broadcast indecency policies or maintain them as they are. As described in more detail herein, Joint Commenters believe that a substantial change from current broadcast indecency policies is fully warranted.

As a threshold matter, the Commission should not in the future punish broadcast licensees for airing fleeting or isolated expletives or nudity; it should never have done so.

[1] By Public Notice, DA 13-1071, released May 10, 2013, the FCC extended the deadline for filing comments in this proceeding until June 19, 2013. Joint Commenters are collectively the licensees of more than 350 radio and television stations nationwide.

Fleeting expletives, which, if aired at all, are typically used in a non-sexual or non-excretory way, should not be found actionably indecent under any circumstances.[2] Indeed, the Commission itself "had it right" in this area of indecency regulation in the three decades prior to its *Golden Globe* decision in 2004.[3] *Golden Globe* improperly overturned a series of prior cases holding that isolated or fleeting expletives did not constitute actionable indecency. The Commission has never adequately justified the drastic 2004 change in its enforcement policy. To the contrary, the Second Circuit's opinion in *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317 (2d Cir. 2010) (subsequent history omitted), compellingly elucidates the constitutional infirmities inherent in any governmental enforcement policy that punishes the broadcast of fleeting or isolated expletives or images of nudity.[4]

With respect to indecency regulation more generally, Joint Commenters commend the Commission's attention to the well-developed, essentially up-to-date record found in multiple briefs filed over the last several years with the Second Circuit and the Supreme Court establishing that industry developments and evolution have mooted the need for indecency

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[2] The same holds true for fleeting or isolated nudity, the visual equivalent of an occasional expletive. *See CBS Corp. v. FCC*, 663 F.3d 122, 126 (3d Cir. 2011) (quoting *CBS Corp. v. FCC*, 535 F.3d 167, 174-75 (3d Cir. 2008)) (noting that for three decades "the Commission's entire regulatory scheme treated broadcast[] images and words interchangeably for purposes of determining indecency").

[3] *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 19 FCC Rcd 4975, 4980 ¶ 12 (2004) ("*Golden Globe*").

[4] *Fox*, 613 F.3d at 325 (citing *Fox Television Stations, Inc. v FCC*, 489 F.3d 444, 458 (2d Cir. 2007)) ("We noted, however, that we were 'skeptical that the Commission [could] provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster'.") (alteration in original). See also *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), which narrowly approved FCC regulation targeting the deliberative and repetitive use of expletives in the extended George Carlin comedic monologue at issue in that case.

regulation by the FCC.[5] Broadcasters are, for example, no longer a "uniquely pervasive" medium or "uniquely accessible" to children as at the time of *Pacifica*, 438 U.S. at 748, 749, but are rather one among many content providers in today's crowded media landscape. Viewers and listeners now enjoy a plethora of choices from diverse programming sources such as cable and satellite television, the internet, on streaming players such as Roku, and even on their mobile phones. Listeners similarly benefit from a host of options for listening to music and other audio programming. For example, terrestrial radio competes every day with satellite radio and streaming services such as Pandora and Spotify. Unlike their numerous competitors, however, only broadcasters remain subject to punitive indecency regulation.

In addition to this explosion of programming sources over the last few decades, new technological tools exist that allow parents to screen programming for their children. The V-chip, which allows parents to block video programs or channels they do not want their children to see, is just one example of currently available program blocking technologies.[6] Parents can also prescreen content using technologies such as digital video records and video-on-demand services. Case law consistently cites the importance of the availability of these less intrusive

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[5] *E.g.*, Brief of Respondents Fox Television Stations, Inc., et al. at 22-24, *Fox Television Stations, Inc. v. FCC*, 132 S. Ct. 2307 (2012) (No. 10-1293); Brief of The Cato Institute, et al. as Amici Curiae Supporting Respondents at 5-22, *Fox Television Stations, Inc. v. FCC*, 132 S. Ct. 2307 (2012) (No. 10-1293); Brief of ACLU, et al. as Amici Curiae Supporting Respondents at 19-22, *Fox Television Stations, Inc. v. FCC*, 132 S. Ct. 2307 (2012) (No. 10-1293); Brief of NAB, et al. as Amici Curiae Supporting Respondents at 35-37, *Fox Television Stations, Inc. v. FCC*, 132 S. Ct. 2307 (2012) (No. 10-1293); Brief of Respondents ABC, Inc., et al. at 41-48, *Fox Television Stations, Inc. v. FCC*, 132 S. Ct. 2307 (2012) (No. 10-1293).

[6] *The V-Chip: Putting Restrictions on What Your Children Watch*, FCC.gov, http://www.fcc.gov/guides/v-chip-putting-restrictions-what-your-children-watch (last visited June 12, 2013). For a relevant development in radio, see Press Release, Ford Motor Company, *Ford's Enhanced MyKey Technology Now Allows Parents to Block Explicit Satellite Radio Content* (Dec. 29, 2010), *available at* http://media.ford.com/article_display.cfm?article_id=33742.

means of blocking content. Where less restrictive alternatives exist, prevailing Supreme Court precedent dictates that the government avoid more restrictive enforcement approaches.[7] Given this jurisprudence and today's marketplace realities, the Commission should forbear from indecency regulation, and put broadcasters on equal First Amendment footing with their counterparts.

If the Commission nonetheless elects to continue to regulate indecent content, whether just in "egregious" cases or more generally, it should do so only with due regard for the governing principles outlined below.

First, any FCC regulation in this area is necessarily constrained by the explicit narrowness of the Supreme Court's decision in *Pacifica*, predicated on its particular facts.[8] *Pacifica*'s ultimate holding relied on the extensive repetition of Carlin's self-selected "seven filthy words" and the time of day that the material aired.[9] In *Pacifica*, the Commission was not looking to prohibit the programming in question, but rather was seeking to channel it.[10] *Pacifica*

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[7] *See, e.g.*, *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 815 (2000) ("Simply put, targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests. This is not to say that the absence of an effective blocking mechanism will in all cases suffice to support a law restricting the speech in question; but if a less restrictive means is available for the Government to achieve its goals, the Government must use it."); *Reno v. ACLU*, 521 U.S. 844, 874 (1997) ("In order to deny minors access to potentially harmful speech, the [Communications Decency Act of 1996] effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.").

[8] In the words of the *Pacifica* Court's plurality opinion, "[i]t is appropriate, in conclusion, to emphasize the narrowness of our holding." 438 U.S. at 750.

[9] *Id*.

[10] *Id*. at 731-33.

reflects appropriate judicial sensitivity to broadcaster's First Amendment rights and programming discretion in content-related matters.

Second, under the teachings of the more recent Supreme Court decision *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012), indecency regulation must comply with the due process protections and obligations of the Fifth Amendment, which requires fair notice to broadcasters before any content may be found actionably indecent. Therefore, under *Pacifica* and *Fox*, the protection of broadcasters' constitutional rights to free speech and due process must occupy a paramount position in any indecency policy.

Third, recent court cases, such as the Second Circuit opinion vacating the FCC's entire indecency scheme on First Amendment grounds,[11] coupled with the history of FCC enforcement of the existing indecency definition (as "clarified" by the FCC's indecency policy statement issued in 2001[12]), demonstrate that the definition used by the FCC pre-*Fox* should be jettisoned. The scheme engendered by that definition is simply too vague and overbroad. Indeed, the Commission has proven unable to implement this scheme consistent with First and Fifth Amendment principles over an extended period of time. Instead, it has produced a hodgepodge of decisions, giving broadcasters only vague guidance as to material the government considers actionable.[13]

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[11] *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317 (2d Cir. 2010) (subsequent history omitted). The FCC has employed the following indecency definition in the past: "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities." FCC, *Obscene, Indecent, and Profane Broadcasts Guide* (2013), http://transition.fcc.gov/cgb/consumerfacts/obscene.pdf.

[12] *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999 (2001) ("*Indecency Policy Statement*").

[13] *See generally Fox*, 613 F.3d 317.

For example, in 2004, the Commission found that a number of stations had violated the Commission's indecency rules when they aired performer Bono's acceptance speech at the 2003 *Golden Globe Awards*, in which he uttered the word "fuckin'."[14] On the heels of that decision, a number of stations decided not to air an unedited version of the film *Saving Private Ryan*, fearing that they would be in violation of the Commission's indecency policy.[15] However, the Commission ultimately found the use of expletives in *Saving Private Ryan*, including the expletive found actionable in *Golden Globe, not* to be actionable indecency, sowing confusion among broadcasters.[16] Creating even more uncertainty, in 2006 the Commission found language similar to that in *Saving Private Ryan*, to be actionably indecent in the PBS documentary *The Blues: Godfathers and Sons*.[17] Broadcasters have been similarly confounded by inconsistencies with respect to FCC enforcement actions concerning the airing of nudity. In 2000, the Commission determined that nudity in the movie *Schindler's List* was not actionable.[18] But, in 2008, the FCC sanctioned stations for relatively brief nudity in the television program *NYPD*

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[14] *Golden Globe*, 19 FCC Rcd at 4975-76.

[15] *See Complaints Against Various Broadcast Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* Memorandum Opinion and Order, 20 FCC Rcd 4507, 4509 n.13 (2004).

[16] *Id.* at 4512.

[17] *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Memorandum Opinion and Order, 21 FCC Rcd 2664, 2683-87 ¶ 72-86 (2006). In April of this year, then FCC Chairman Julius Genachowski further compounded the confusion by issuing a tweet from the FCC's verified Twitter account concerning the Bono-like expletive employed on air by Boston Red Sox star David Ortiz in connection with the Boston Marathon bombing: "David Ortiz spoke from the heart at today's Red Sox game. I stand with Big Papi and the people of Boston – Julius." Elizabeth Titus, *FCC Chairman Julius Genachowski Tweets on David Ortiz F-Bomb*, Politico (Apr. 20, 2013, 8:36PM), http://www.politico.com/story/2013/04/fcc-julius-genachowski-david-ortiz-twitter-90376.html.

[18] *WPBN/WTOM License Subsidiary, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 1838 (2000).

Blue.[19] These muddled and often contradictory decisions have failed to give broadcasters the guidance necessary to make informed programming decisions, creating a constitutional morass.

Any new definition of indecency that the FCC fashions must be clearly articulated. It cannot be vague or overbroad. For example, if the FCC wishes to try to create a new category of actionable "egregious" cases, egregiousness must be defined in accordance with the principles set forth in *Fox*. Under that very recent precedent, any new FCC indecency definition would have to provide the fair notice required by constitutional due process. The FCC cannot regulate in "terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[20] Under any scheme of indecency regulation: (1) regulated parties must know what is required of them so that they may act accordingly; and (2) precision and guidance are necessary so that those enforcing the law do not act in a discriminatory or arbitrary way.[21]

If the FCC believes it necessary to continue to regulate in this area, not only should the substantive policies relating to indecent content be changed, indecency-related processing rules should also be overhauled. The current processing scheme is far too imprecise, costly, and time consuming. To improve the processing of indecency-related complaints, the Commission should only entertain documented complaints against specific stations from bona fide viewers and

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[19] *Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue,"* 23 FCC Rcd 3147 (2008) (subsequent history omitted).

[20] *Fox*, 132 S. Ct. at 2317 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

[21] *Id*.

listeners. Such documentation has previously taken the form of either a tape or a transcript.[22] Undocumented allegations of complainants should not be credited, particularly when there is no way to establish what material actually aired.

Furthermore, prompt processing and disposition of complaints is imperative. Lengthy complaint processing times visit collateral commercial damage on stations. Specifically, complaints delay grants of stations' license renewals, which can negatively impact station financing and harpoon transactions. In particular cases, processing "holds" on applications can effectively force broadcasters to enter into tolling agreements with the Commission. The process for entering into these tolling agreements involves time and costly negotiations, and sometimes leads to additional, indefinite delays. The resources used to negotiate these agreements and to hold applications in abeyance could be much better employed elsewhere. Processing delays disserve the public interest in other ways. As the Supreme Court recently (and unanimously) recognized in interpreting 28 U.S.C. § 2462, the statute of limitations which governs the collection of FCC forfeitures, time limits "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[23]

Finally, the FCC should take into account the substantial and constitutionally-suspect chill on speech that the threat of large fines creates. As with *Saving Private Ryan*, broadcasters concerned about potential forfeitures may not broadcast programming content they would

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[22] *See, e.g.*, *Indecency Policy Statement*, 16 FCC Rcd at 8015, ¶ 24-25 ("In order for a complaint to be considered, our practice is that it must generally include . . . a full or partial tape or transcript or significant excerpts of the program . . . . If a complaint does not contain the supporting material . . . it is usually dismissed by a letter to the complainant advising of the deficiency.").

[23] *Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013) (quoting *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944)).

otherwise air for fear that it may be found indecent, no matter its merits. The heavy hand of government regulation should be stayed wherever possible, giving way to a *restrained* approach, one that not only respects the discretion inherent in editorial decisions made by broadcasters every day, but enhances the rich diversity of speech that is America's hallmark, in a manner consonant with the *Pacifica* and *Fox* decisions. Inadequately articulated indecency regulation inevitably has a pernicious effect on broadcast speech. It should be avoided at the outset as, ultimately, it cannot stand.

Joint Commenters respectfully request that the Commission, in revising its indecency policies, take full account of the concerns articulated above.

Respectfully submitted,

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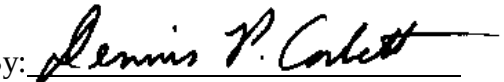
By: 

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